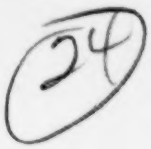


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 876

ALBERT BEHRENS,

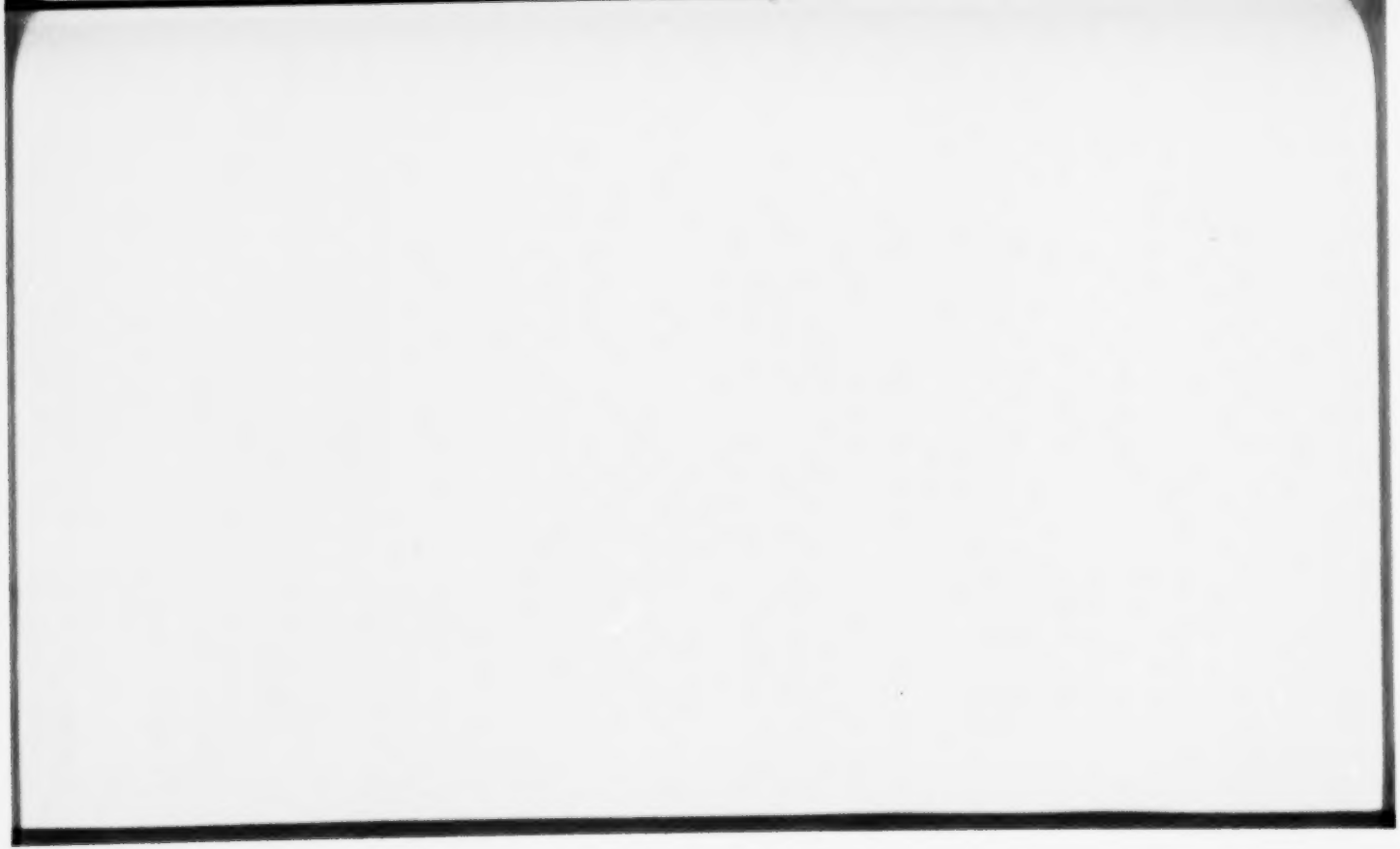
Petitioner,

vs.

TOM SMITH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

HOWARD E. FOSTER,
Counsel for Petitioner.



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Now comes the petitioner, Albert Behrens, and represents to the Court, and advises the Court, as follows: That the petitioner seeks a writ of certiorari to review the judgment of the Supreme Court of the State of Washington, dated November 15th, 1945 (R. 12-19), which affirmed a judgment of the Superior Court of the State of Washington for Pierce County in said State dated April 27, 1945 (R. 11), denying the petitioner's release from the Washington State Penitentiary on a writ of *habeas corpus* (R. 11). On appeal from the decision of the nisi court, the Supreme Court filed an opinion on November 15, 1945, affirming the judgment of the nisi court denying the petition for a writ of *habeas corpus* (R. 12-19). The judgment of the Supreme Court has not been reported but the same

is in the record, and can be found in Vol. 124, No. 3, Page 118 of the advanced sheets of the said court of last resort of said State.

Jurisdiction of the Supreme Court

This Court has jurisdiction to review the judgment of the Supreme Court of the State of Washington, under favor of Sec. 240(a) of the Judicial Code and the Rules of Practice and Procedure as promulgated by this Court.

Summary and Short Statement of the Matters Involved and Reasons Relied On

On January 26, 1938, the Prosecuting Attorney for King County, Washington, filed in the Superior Court of that County, an information charging the petitioner with the crime of carnal knowledge committed on or about January 24, 1937 (R. 5). On May 18, 1938, petitioner was convicted, it seems, by a jury, and on June 11, 1938, a judgment of sentence was entered pursuant to the verdict of the jury, and an *amended* information, which was never filed in the cause, and ordered the petitioner confined in the Washington State Penitentiary for a term not more than life on count one of the information that was never filed, and for twenty years on count II of the said unfiled information (R. 7-10). The minimum sentence on count one was to be fixed by the Parole Board (R. 7). The information was supposed to be filed under favor of Sec. 2436 of the Statutes of Washington, and the sentence attempted to be imposed under favor of such Section as amended. At the time of the sentencing there was no Parole Board in the State of Washington. It is contended that the entire proceedings of the nisi court were irregular and void. There was no such crime as carnal knowledge; the information contained only one count; the judgment of sentence

is void; the same is *ex-post facto* and void, and the petitioner unlawfully confined in prison. That the amended statute, 2436, did not go into effect until June 10, 1937.

Specification of Errors

1. The Supreme Court of Washington erred in affirming the judgment of the trial court, and erred in denying petitioner's prayer for release on *habeas corpus,* and in holding the nisi court had jurisdiction of the person of the petitioner and authority to enter the judgment herein complained of. That a judgment could be entered in a criminal case in the absence of an information, and when the judgment recites the same was entered upon an amended information that never was filed of record in the trial court, and was not contended otherwise in the return to the application for release.

2. The Supreme Court of Washington State erred in holding an *ex-post facto* sentence can be upheld in affirming the judgment of the nisi court, and in not reversing the judgment of the trial court and ordering the release of the petitioner, and in not finding that petitioner's motion for judgment in the trial court should have been sustained.

Reasons Relied On for Granting Certiorari

1. The record shows petitioner was sentenced to prison on three counts deraigned in an amended information that was never filed, or in respects made a matter of record (R. 5-10). The imprisonment ordered on counts II and III of the amended information which was never filed was held to be invalid (R. 19-20). The imprisonment on count one was sustained in the nisi court and the judgment so holding was affirmed in the court of last resort (R. 12-19). The judgment on count one is in all respects invalid, and punishment inflicted is *ex-post facto.*

2. The judgment of the Supreme Court of the State of Washington affirming the judgment of the nisi prius court deprives petitioner of his rights of due process of law under the Constitution of the United States, the Fourteenth Amendment, and the provisions of the Constitution of the State of Washington.

ALBERT BEHRENS,
Petitioner,
By HOWARD E. FOSTER,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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ALBERT BEHRENS,

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TOM SMITH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Point 1.

The record shows petitioner was charged by information filed in the Superior Court of King County, Washington, with the crime of "carnal knowledge" committed on or about January 24th, 1937. In May 1938, petitioner was convicted, it seems, and sentenced to the Washington State Penitentiary on three counts of an amended information which was never filed (R. 5-10). The sentence on counts I and II were suppressed by the nisi prius court (R. 11). The information was filed under favor of Sec. 2436 of the Statutes of the State of Washington; the sentence was imposed under favor of the same section as amended, and which amended statute became available June 10, 1937 (Sec. 31, Art. 2, Constitution of the State of Washington).

Under the original section children could be charged under it; under the amended section, adults only.

The reviewing court had only the sentence under count I to settle. The trial court had no jurisdiction of the petitioner at the time of the passing of sentence, and was without authority to enter the judgment of sentence. The judgment being void, the petitioner was entitled to be discharged. The return of the Superintendent of the Washington State Penitentiary shows the imprisonment illegal; the two exhibits attached to the return and made a part of such pleading show the judgment and sentence imposed pursuant to counts in an amended information which was never filed (R. 5-11). The exhibits control the recitals of the pleading.

Clark v. *Cross,* 51 Washington Reports, 231;
Willard v. *Davis,* 122 Fed. 363;
Continental Securities v. *Transit Company,* 165 Fed. 945.

The record—judgment of sentence—shows the same to be *ex-post facto* (R. 5-11). Under Section 2436, supra a minimum sentence of five years is provided; under the amended section life is provided for adults. The sentence is *ex-post facto.*

Lindsey v. *State,* 301 U. S. 379;
Palmer v. *McCauley,* 21 Fed. Supp. 79;
15 Am. Jur. Sec. 459—page 116—.

An agency unknown was directed to fix the minimum sentence—"The Parole Board" (R. 7). There was no such agency. The agency provided by the Statutes is the Board of Prison, Terms and Parole. Sec. 10249-1 and as amended—10249-2.

There is no such crime in the Washington statutes as carnal knowledge. If it can be construed that the amended

section of 2436, gives the court jurisdiction to sentence pursuant to a conviction under the section before it was amended, then and in which event, said amended section is found in Chap. 24 of the Laws of Washington for 1937, and the same is unconstitutional as it violates Sec. 19, Art. 2 of the State Constitution. The constitution referred to provides that no bill shall comprise more than one subject and that must be expressed in the title.

The judgment of the nisi prius court is void; the judgment of the reviewing court affirming such judgment is void.

Ex parte Hewit, Fed. Cas. No. 6,442;
In re Medley, 134 U. S. 160;
In re Savage, 134 U. S. 176;
Anderson v. *Denver,* 265 Fed. 3 —.

Habeas corpus lies where a judgment or sentence is fatally defective upon the face of the record.

Lim v. *Davis,* 75 Utah 245; 76 Am. Law Rep. 460.

Criminal statutes must be strictly construed and in the interest of life and liberty.

16 C. J. 1360, Sec. 6; 15 Am. Jur. Sec. 459.

The judgment of the Washington State Supreme Court denies to petitioner rights guaranteed under the 14th Amendment to the Federal Constitution.

Point 2.

In *Lindsey* v. *State,* 301 U. S. 379, it was held that an *ex-post facto* judgment of the State court was void and the judgment was open to attack. In *Palmer* v. *McCauley,* 21 Fed. Supp. 79, the same holding was observed.

WHEREFORE, petitioner most respectfully prays that a writ of certiorari issue herein to the Supreme Court of the State of Washington directed, commanding that Court

to certify and send to this Court for its review and determination on a day certain therein named the full and complete transcript of the record and all proceedings in this cause, and that the decision and judgment of the Supreme Court of the State of Washington may be reversed, and that your petitioner may be discharged from custody, and for such other and further relief as may be proper.

ALBERT BEHRENS,
Petitioner,
By HOWARD E. FOSTER,
Attorney for Petitioner.

(2887)

End